Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

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No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, and FIRST NATIONAL BANK OF BOSTON,

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SECOND CIRCUIT

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Petitioner finds it necessary to correct the serious misstatement in respondent bank's opposing brief (p. 4) that "for the first time petitioner seeks to smuggle an additional issue into the case and attempts to raise the question of whether the

mandatory venue requirement of Section 94 of the National Bank Act has been superseded by the venue provisions of the Exchange Act." The District Court opinion held unequivocally that "absent waiver or consent, a national bank may be sued only in the district in which it is established," citing §94 of the National Bank Act and the leading authorities so holding (App. A, 1a). Manifestly, we could not ask Judge MacMahon to overrule the decisions of the Second Circuit upon which he was bound to rely. However, as the bank's brief (p. 6) states:

> "The only time petitioner ever referred to the *Ronson* case, decided on August 15, 1973, was on May 23, 1975 at oral argument before the Court of Appeals. After petitioner's counsel called the court's attention to the *Ronson* case, Judge Mulligan specifically asked whether in light of *Ronson* petitioner was asking the Court of Appeals to reconsider and overrule its decision in the *Bruns, Nordeman* case, *supra.*"

Indeed, Samuel Gottlieb, Esq., co-author of the briefs here submitted, actually read an extract to the Court of Appeals from the opinion of the Third Circuit in *Ronson* and suggested that in light of that carefully considered opinion to the contrary by the Third Circuit, the matter at bar merited reconsideration, a suggestion that was summarily rejected by the Second Circuit. The oral transcript of the argument will so indicate and would not support the position taken by the respondent's brief (p. 6) when it indicates that "petitioner's counsel stated expressly that he was declining" to have the court do so. Thus, Second Circuit passed on the question in its summary affirmance.

We felt duty bound and indeed had no other recourse but to take that position, which it must be admitted, was an exercise in futility since the Second Circuit summarily affirmed on oral argument. It would have been equally futile in view of ***Bruns*** and other decisions rendered in the Second Circuit by other panels and a misuse of judicial economy, to have asked for rehearing or *en banc* determination.

Finally, we submit that the question here sought to be reviewed as a matter of law necessarily rises to the surface for consideration by this Court in view of the holdings below that the bank's "designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of the venue provision" of Section 94 of the National Bank Act barring suit in this state (App. A, 2a).

CONCLUSION

For all the reasons mentioned above, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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